Accountability, Protection and Access to Justice:

Amnesty International's Concerns with respect to Bill C-43

Submission to the
House of Commons Standing
Committee on
Citizenship and Immigration

Amnesty International Canada

October 31, 2012

AMNESTY INTERNATIONAL

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Introduction

On 20 June 2012, Bill C-43: The Faster Removal of Foreign Criminals Act was tabled in the House of Commons.[1] The Bill proposes several amendments to the *Immigration and Refugee Protection Act*.[2] Amnesty International Canada (English Branch) ("AI Canada") is concerned that Bill C-43, as currently drafted, contravenes several binding international human rights treaties to which Canada is a party, and therefore would likely result in serious violations of international law and the *Canadian Charter of Rights and Freedoms* (*Charter*).

This document outlines AI Canada's three key human rights concerns regarding Bill C-43's effects: accountability; protection, and access to justice.

[1] Bill C-43: An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act), Available at [http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5693440], Accessed 22 October 2012 [Bill C-43].
[2] *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [*IRPA*].

1 – ACCOUNTABILITY

Under international law, Canada has an obligation to prosecute or extradite individuals suspected of being responsible for crimes that are subject to universal jurisdiction, including terrorism, – even when those offences are not linked to Canada in any direct way.[3] Domestic law, through provisions in the *Criminal Code*[4] and the enactment of the *Crimes against Humanity and War Crimes Act*,[5] allows Canada to exercise its universal jurisdiction in respect of these serious offences.

However, Canada's practice has overwhelmingly been to expel or prevent the entry of suspected criminals, in violation of its obligation to ensure accountability and justice for grave international crimes. In the 25 years since the *Criminal Code* was amended to allow for universal jurisdiction prosecutions, only a handful of cases have been launched,[6] and in the 12 years since the *Crimes Against Humanity and War Crimes Act* came into force, only two criminal prosecutions have been initiated.[7] In many cases, deportation is pursued instead of prosecution. In other cases, no action is taken.[8] The UN Committee against Torture has repeatedly expressed concern about Canada's "apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory."[9] As Professor Fannie Lafontaine has asserted, this "[w]idespread and ill-considered recourse to deportation is an unjustifiable retraction from [Canada's] international responsibilities."[10]

Bill C-43 continues this practice of preferring exclusion or deportation over extradition or prosecution, in violation of Canada's binding international legal obligations. For instance, under clause 8 of the Bill, the Minister can, on his or her own initiative, declare that any foreign national may not enter Canada for a period of three years, if – in the Minister's opinion – it is justified on the basis of public policy considerations.[11] Furthermore,

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[3] Canada is bound by many bilateral extradition and multilateral treaties that contain an obligation to extradite or prosecute, including the 1949 *Geneva Conventions*. For a full list and discussion of these obligations, see: International Law Commission, "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Comments and Information Received from Governments," 26 March 2009, UN Doc. A/CN.4/612, at paras. 35-55.

[4] As one example, see *Criminal Code* (R.S.C., 1985, c. C-46), s. 269.1 [*Criminal Code*].

[5] *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24).

[6] Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) [Lafontaine].

[7] Désiré Munyaneza and Jacques Mungwarere are the only people who have been criminally prosecuted under the *Crimes Against Humanity and War Crimes Act* (Lafontaine, *supra* note 6, p. 35).

[8] Amnesty International Canada, *Canada: Brief to the UN Committee Against Torture* (May 2012), p. 14.

[9] Committee Against Torture, *Canada: Conclusions and Recommendations of the Committee against Torture*, (CAT/C/CR/34/CAN), July 2005, at para. 4(e) [Committee Against Torture].

[10] Lafontaine, *supra* note 6, p. 337.

[11] Bill C-43, *supra* note 1, clause 8 (proposed s. 22.1):
"s. 22.1 (1) The Minister may, on the Minister's own initiative, declare that a foreign national, other than a foreign national referred to in section 19, may not become a temporary resident if the Minister is of the opinion that it is justified by public policy considerations.
(2) A declaration has effect for the period specified by the Minister, which is not to exceed 36 months.

clauses 9,[12] 10,[13] and 24[14] of the Bill will eliminate humanitarian relief and appeal procedures for certain kinds of criminals and suspected criminals, which will undoubtedly facilitate their removal but also hinder efforts to hold them accountable for their conduct.

In the subsequent section of this Brief Amnesty International expresses concern about ways that curtailing Ministerial and humanitarian and compassionate relief, coupled with denying access to appeals of deportation orders may expose individuals to a risk of torture and other serious human rights violations once they are removed from Canada. Amnesty International is also, however, concerned that the singular focus of the proposed amendments on exclusion and deportation once again increases the possibility of individuals not being held accountable for serious crimes under international law.

In the subsequent section of this Brief Amnesty International is calling for the provisions that would remove access to humanitarian relief and to appeal procedures to be withdrawn so as to ensure individuals are protected from the risk of being returned from Canada to face serious human rights violations in other countries.

Amnesty International recommends that the Bill be amended to ensure that provisions with respect to exclusion and deportation do not undermine Canada's obligations with respect to ensuring that individuals seeking entry to or present in Canada, who may have committed serious crimes under international law, are either extradited to a country where a fair investigation and trial would occur or are investigated and prosecuted within Canada. The Bill should provide that such individuals will be arrested and taken into custody or that other legal measures will be taken to ensure their presence pending a determination whether to institute criminal or extradition proceedings and to make a

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(3) The Minister may, at any time, revoke a declaration or shorten its effective period."

[12] Bill C-43, *supra* note 1, clause 9 (proposed s. 25(1)):
"s. 25 (1) The Minister must, on request of a foreign national in Canada who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 —, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[13] Bill C-43, *supra* note 1, clause 10 (proposed s. 25.1(1)):
"s. 25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[14] Bill C-43, *supra* note 1, clause 24 (proposed s. 64(2)):
"s. 64 (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*)."
IRPA, supra note 2, s. 64(1):
"s. 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality."

preliminary inquiry into the facts. If sufficient admissible evidence is available, the Bill should ensure that the case will be submitted to competent authorities for the purposes of investigation or prosecution, unless an extradition request has been made by another state.

2 – PROTECTION

Amnesty International is concerned that provisions in Bill C-43 may lead to human rights violations as it increases the likelihood of individuals being removed from Canada to a serious risk of torture and other human rights violations; and fails to adequately safeguard rights related to the best interests of children.

a. Ban on torture and persecution

One of the most fundamental and longstanding principles in international law is that every human being has the right not to be tortured or persecuted, or sent to a country where there is a risk of torture or persecution (known as "refoulement"). The ban on torture has found expression in the *Universal Declaration of Human Rights*,[15] *International Covenant on Civil and Political Rights*,[16] and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[17] The prohibition on refoulement is set out in the *Refugee Convention*[18] and *Convention Against Torture*.[19] The *Criminal Code* and *Charter of Rights and Freedoms* also prohibit torture,[20] and the *Immigration and Refugee Protection Act* affirms that one of its goals is to offer protection from persecution and torture.[21]

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[15] *Universal Declaration of Human Rights* (10 December 1948), G.A. 217 A (III), [UDHR]:
"Art. 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[16] *International Covenant on Civil and Political Rights* (16 December 1966), 6 I.L.M. 368, [ICCPR]:
"Art. 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
[17] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) G.A. Res. 39/46, [CAT]:
"Art. 2(2): No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."
[18] *Convention Relating to the Status of Refugees* (28 July 1951), U.N. Treaty Series, vol. 189, p. 137 [Refugee Convention]:
"Art. 33: (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[18]
[19] CAT, *supra* note17:
"Art. 3(1): No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
[20] *Criminal Code*, *supra* note 4, s. 269.1; *Constitution Act, 1982, being Schedule B to the Canada Act 1982* (U.K.), 1982, c. 11, [Charter]:
"s. 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."
[21] *IRPA*, *supra* note 2:
"s.3(2)(d): to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality,

Under the *Refugee Convention* the only exceptions to the right not to be subject to *refoulement* to a well-founded fear of persecution arise in extremely limited and well-defined circumstances, when there is a reasonable basis to consider a refugee a serious danger to the host country.[22] That is of course, however, circumscribed by unconditional *refoulement* protections in the Convention against Torture and other international norms, which have no exceptions.[23] The UN Committee Against Torture has criticized Canada for failing to recognize "the absolute nature of the protection of Article 3 of the Convention [Against Torture], which is not subject to any exception whatsoever."[24] The Human Rights Committee has also raised this concern and called for Canada to amend its laws:

> No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.[25]

As we discuss below, several aspects of Bill C-43 contravene Canada's legal obligations with respect to torture and non-refoulement. Clauses 8, 9, 10, 18 and 24 of the Bill will eliminate humanitarian relief and appeal procedures for certain categories of criminals or suspected criminals, allow for entirely discretionary decisions to deny entry, and restrict the application of ministerial relief. Contrary to international law, a large number of offences caught by Bill C-43 do not reach the level of particularly serious crime or of being a danger to Canada, and decisions to deny entry or refuse relief can be made without reference to the danger an individual poses. In short, these proposed changes will all increase the chances of someone suffering torture or persecution.

i. Restricting humanitarian relief

Clauses 9[26] and 10[27] eliminate humanitarian relief for those found inadmissible to Canada under ss. 34 (terrorism), 35 (violating human rights) or 37 (organized crime).

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political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment."

[22] Refugee Convention, *supra* note 18:
"Art. 33(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

[23] CAT, *supra* note 17, Art. 2(2).

[24] Committee Against Torture, *supra* note 9, at para. 4(a).

[25] UN Human Rights Committee, *"Concluding observations of the Human Rights Committee: Canada," UN Doc. CCPR/C/CAN/CO/5 (20 April 2006),* at para. 15.

[26] Bill C-43, *supra* note 1, clause 9 (proposed ss. 25(1)):
"s. 25 (1) The Minister must, on request of a foreign national in Canada who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 —, examine the

These inadmissibility provisions may apply to people who have neither been charged with nor convicted of any crime, and may include individuals who represent no security threat or danger to the public. The Canadian Council for Refugees has noted that examples of individuals who would be found inadmissible include: a present or past member (even at a very low level) of a national liberation movement such as the African National Congress; a member of organization opposed to repressive governments such as Gaddafi or Pinochet (s. 34 – security inadmissibility); and an employee in a government that committed human rights abuses who courageously opposed those abuses (s. 35 – human or international rights violations).[28]

Eliminating the possibility of humanitarian relief for these types of people runs afoul of international law. Denying individuals access to this process might result in them being sent to torture (which is never permissible),[29] or persecution (which is only permissible under the exceptional circumstances of having committed a particularly serious crime or posing a serious danger to Canada).[30]

Amnesty International recommends that clauses 9 and 10 be withdrawn and that access to humanitarian and compassionate relief be maintained.

ii. Restricting the right of appeal

Similarly, it would be in violation of Canada's international legal obligations with respect to torture to eliminate, under clause 24, the right of appeal to permanent residents if they are sentenced to six or more months in prison (the current *IRPA* sets the bar at two years) or if the person is convicted of (or committed an act that would constitute) an offence outside of Canada that is punishable in Canada by a maximum term of imprisonment of at least 10 years (regardless of the length of sentence imposed).[31]

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circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[27] Bill C-43, *supra* note 1, clause 10 (proposed ss. 25.1 (1)):
"s. 25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[28] Canadian Council for Refugees, "Bill C-43 – Reducing fairness for refugees and permanent residents: A Submission to the House of Commons Standing Committee on Citizenship and Immigration," 26 October 2012, Available at [http://ccrweb.ca/files/c43_comments-oct-2012.pdf], Accessed 27 October 2012, p. 2 [CCR, Bill C-43].

[29] CAT, *supra* note 17, Art. 2(2).

[30] Refugee Convention, *supra* note 18, Art. 33(2).

[31] Bill C-43, *supra* note 1, clause 24 (proposed s. 64(2)):
"s. 64 (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*)."
IRPA, supra note 2:
"s. 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of

Offences covered by this new definition of "serious crimes" include: growing as few as six marijuana plants for the purpose of trafficking;[32] possession of a stolen or forged credit card or the use of that credit card knowing it had been cancelled;[33] making a recording in a movie theatre,[34] and injuring cattle.[35] Given the recent changes to the criminal justice system, such as Bill C-10's imposition of mandatory minimum sentences, lowering the threshold from 2 years to 6 months would affect large numbers of permanent residents.[36]

From the perspective of the international protection against torture and persecution, clause 24 is worrisome in two ways. First, eliminating an avenue to correct a faulty decision will increase the chances of someone being sent to a country where they risk suffering serious human rights abuses. Second, this provision relies on other countries' penal laws and criminal justice systems, which may fall far short of Canadian standards. Elsewhere, convictions might be reached through the reliance on torture-derived evidence, which could make Canada complicit in torture. Access to an appeal ensures that those concerns can be assessed.

Amnesty International recommends that clause 24 be removed and that access to the appeal process be maintained.

iii. Curtailing ministerial discretion to waive inadmissibility

In clause 18, Bill C-43 combines the provisions allowing the Minister of Public Safety to exempt people from inadmissibility on grounds of security (s. 34), human or international rights violations (s. 35(1)(b) and (c)), and organized criminality (s. 37(1)). Under a new provision – the proposed s. 42.1 – the Minister may declare that the matters referred to in ss. 34, 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.[37] This terminology is virtually identical to the current

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security, violating human or international rights, serious criminality or organized criminality."

[32] *Controlled Drugs and Substances Act* (S.C. 1996, c. 19), s. 7(2)(b)(i).

[33] *Criminal Code*, *supra* note 4, s. 342.

[34] *Criminal Code*, *supra* note 4, s. 432.

[35] *Criminal Code*, *supra* note 4, s. 444.

[36] 41st Parliament, 1st Session, Edited Hansard # 159, 4 October 2012 (Nycole Turmel (Hull-Aylmer, NDP)), Available at [http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId= 5743882&Language=E], Accessed 24 October 2012 [Hansard].

[37] Bill C-43, *supra* note 1, clause 18 (proposed s. 42.1):

"s. 42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada."

provisions in the *IRPA*,[38] though the expression "detrimental" has been replaced by "contrary." What is new in Bill C-43 is that in the Minister's analysis, s/he may only take into account national security and public safety considerations, but "is not limited to considering the danger that the foreign national presents to the public or the security of Canada."[39] This wording is based on a decision by the Federal Court of Appeal[40] that is the subject of an appeal recently heard by the Supreme Court of Canada.[41]

This provision once again, in restricting the ability to consider humanitarian considerations as part of an exercise of Ministerial relief, increases the likelihood of someone being removed to torture or persecution. It also seems to allow the Minister – in direct contravention of the *Refugee Convention*[42] – to take into account national security and public safety considerations that are distinct from any actual danger posed by the foreign national. In fact, it opens up the possibility of an individual being found inadmissible for reasons having nothing to do with their own individual circumstances.

Amnesty International recommends that this provision be redrafted to bring precision and clear definitions to what are already vague and potentially far-reaching inadmissibility provisions. Inadmissibility should be limited to an individual's own personal circumstances and should be determined in a manner that provides full procedural fairness and ensures respect for the ban on *refoulement* to torture and other international human rights principles.[43] Alternatively, Amnesty International recommends that this clause be withdrawn.

b. Children and families

Canada is obliged, under binding international law, to uphold children's rights in its immigration proceedings. The *Convention on the Rights of the Child* provides, in article 3(1) that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[44]

The UN Committee on the Rights of the Child recently urged Canada to "Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes."[45]

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[38] *IRPA*, *supra* note 2, ss. 34(2), 35(2), 36(3)(c), 37(2)(a).
[39] Bill C-43, *supra* note 1, clause 18 (proposed s. 42.1(3)).
[40] *Canada (Public Safety and Emergency Preparedness) v. Agraira*, 2011 FCA 103.
[41] Hearing 18 October 2012, decision reserved.
[42] Refugee Convention, *supra* note 18, Art. 33(2).
[43] The ministerial relief provisions do not function as they should. See Canadian Council for Refugees, *From Liberation to Limbo*, Available at [http://ccrweb.ca/files/from_liberation_to_limbo.pdf], Accessed 23 October 2012, pp. 22-23 [CCR, *Liberation to Limbo*].
[44] *Convention on the Rights of the Child* (20 November 1989), G.A. res. 44/25, Art. 3(1) [CRC].

Under the current *IRPA*, an application for permanent residence on humanitarian and compassionate grounds is the only avenue in Canada's immigration regime for the explicit consideration of the best interests of the child.

Clauses 9[46] and 10,[47] which eliminate the possibility of humanitarian relief for those found inadmissible under ss. 34 (terrorism), 35 (violating human rights) or 37 (organized crime), could lead to violations of the *Convention on the Rights of the Child*. Under these proposed changes, no child's best interests would be considered if the proceedings involved individuals found inadmissible under certain grounds. Indeed, far from making this interest the primary consideration in a deportation order, this Bill would penalize children for other people's actual or perceived conduct.

Another related effect of clauses 9 and 10 is that families will undoubtedly be broken up – potentially on a permanent basis. For instance, a child living in a refugee camp in Ethiopia could be permanently separated from his father, who is a refugee in Canada, because the father is inadmissible on the basis that he participated in a non-violent manner in the Eritrean liberation struggle (s. 34 – security inadmissibility).[48]

The arbitrary separation of family members contravenes binding international law that recognizes the primacy of the integrity of the family and the right to family life. This principle is enshrined in the *Universal Declaration of Human Rights*,[49] *International Covenant on Civil and Political Rights*,[50] *International Covenant on Economic, Social and*

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[45] UN Committee on the Rights of the Child, *Concluding Observations: Canada*, UN Doc. CRC/C/CAN/CO/3-4, 5 October 2012, Available at [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-CAN-CO-3-4_en.pdf], Accessed 24 October 2012, at para. 74..

[46] Bill C-43, *supra* note 1, clause 9 (proposed ss. 25(1)):
"s. 25 (1) The Minister must, on request of a foreign national in Canada who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 —, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[47] Bill C-43, *supra* note 1, clause 10 (proposed ss. 25.1 (1)):
"s. 25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[48] For more examples, see CCR, *Liberation to Limbo*, *supra* note 43.

[49] UDHR, *supra* note 15:
"Art. 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[50] ICCPR, *supra* note 16:
"Art. 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

Cultural Rights,[51] and *Convention on the Rights of the Child*.[52] The *IRPA* itself proclaims family reunification as one of its goals.[53]

In addition to these concerns about protecting the best interests of children, it is important to note that the UN Human Rights Committee has clarified that interferences with individuals' family and home may be only undertaken in accordance with legislative measures which specify in detail the precise circumstances in which such interferences may be permitted and circumscribe the types of interferences.[54] Furthermore, "interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant" and be a reasonable, necessary and proportionate means to achieving a legitimate aim.[55] In completely excluding certain classes of inadmissible individuals from humanitarian relief, Bill C-43 fails to meet this standard of reasonableness, necessity and proportionality.

Amnesty International recommends that clauses 9 and 10 be removed. In the alternative, there should be explicit provision for the requirement to make the best interests of the child a primary consideration in all immigration proceedings, as well as the obligation to respect the right to family life.

3 – ACCESS TO JUSTICE

Canada is bound by international and domestic obligations to uphold standards of procedural fairness in its administrative and judicial systems, including within immigration proceedings.

The right of appeal – including appeal from a decision resulting in deportation – is enshrined in international human rights law binding upon Canada. The right against arbitrary exile is set out in the *Universal Declaration of Human Rights*.[56] The *International Covenant on Civil and Political Rights* (ICCPR) clarifies that expulsion from

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[51] *International Covenant on Social, Economic and Cultural Rights* (16 December 1966), G.A. Res. 2200A (XXI): "Art. 10: The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

[52] CRC, *supra* note 44:
"Art. 10(1): In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family."

[53] *IRPA*, *supra* note 2, ss. 3(1)(d), 3(2)(f).

[54] UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, at para. 8 [HRC, *General Comment 16*].

[55] HRC, *General Comment 16*, at para. 3.

[56] UDHR, *supra* note 15:
"Art. 9: No one shall be subjected to arbitrary arrest, detention or exile."[56]

a territory may only occur in a way that respects fair trial protections.[57] Furthermore, this Covenant declares that all persons are equal before the courts and tribunals,[58] and that no discrimination of any kind is permitted in the exercise of guaranteed ICCPR rights.[59] The Human Rights Committee (HRC) has confirmed that states are required to grant all aliens facing deportation an opportunity to appeal deportation orders prior to removal.[60] The HRC has also elaborated on this point in a General Comment, and asserted that the standard for denying the right of appeal is "compelling reasons of national security."[61]
Bill C-43 violates Canada's obligation under international law to uphold the right of appeal. Clause 24 would deny the right of appeal for permanent residents if they are sentenced to six or more months in prison (the current law sets the bar at two years) or if the person is convicted of (or committed an act that would constitute) an offence outside of Canada that is punishable in Canada by a maximum term of imprisonment of at least 10 years (regardless of the length of sentence imposed).[62] Denying the right of appeal to these individuals constitutes discrimination. Clause 24 would include many offences that fall far short of "compelling reasons of national security"[63] and thus runs afoul of international law.

As the Supreme Court of Canada held in *Baker*:

> The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.[64]

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[57] ICCPR, *supra* note 16:
"Art. 13: An alien lawfully in the territory of a State Party […] may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by […] the competent authority."
[58] ICCPR, *supra* note 16:
"Art. 14(1): All persons shall be equal before the courts and tribunals."
[59] ICCPR, *supra* note 16:
"Art. 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[60] UN Human Rights Committee, *Hammel v. Madagascar* (3 April 1987) Communication No. 155/1983, at paras. 18.2-19.2.
[61] UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, at para. 10 [HRC, *General Comment 15*].
[62] Bill C-43, *supra* note 1, clause 24 (proposed s. 64(2)):
"s. 64 (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*)."
IRPA, *supra* note 2:
"s. 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality."
[63] HRC, *General Comment 15*, *supra* note 61, para. 10; also see this document, Section 2(a)(ii).
[64] *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 25.

That approach best assures proper regard for important international human rights obligations as well. Bill C-43 violates these constitutional and international requirements by eliminating virtually all procedural protections to certain individuals. Clauses 9,[65] 10,[66] and 24[67] arbitrarily deny some people the ability to appeal decisions that could result in their deportation, and eliminate certain people's access to humanitarian relief. Furthermore, clauses 8[68] and 18[69] open up a broad swath of ministerial discretion to deny someone entry and to refuse relief from inadmissibility. The Minister's ability, on his or her own initiative, to declare or decline to declare someone inadmissible, is not curtailed by any procedural protections for the person who might be thereby expelled from Canada. Nor is the Minister's discretion to deny entry to Canada restrained by any procedural requirements. Moreover, in such a context decisions made under the authority of clauses 8 or 18 might well raise concerns about a reasonable apprehension of bias.

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[65] Bill C-43, *supra* note 1, clause 9 (proposed s. 25(1)):
"s. 25 (1) The Minister must, on request of a foreign national in Canada who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 —, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[66] Bill C-43, *supra* note 1, clause 10 (proposed s. 25.1(1)):
"s. 25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[67] Bill C-43, *supra* note 1, clause 24 (proposed s. 64(2)):
"s. 64 (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*)."
IRPA, supra note 2, s. 64(1):
"s. 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality."

[68] Bill C-43, *supra* note 1, clause 8 (proposed s. 22.1):
"s. 22.1 (1) The Minister may, on the Minister's own initiative, declare that a foreign national, other than a foreign national referred to in section 19, may not become a temporary resident if the Minister is of the opinion that it is justified by public policy considerations.
(2) A declaration has effect for the period specified by the Minister, which is not to exceed 36 months.
(3) The Minister may, at any time, revoke a declaration or shorten its effective period."

[69] Bill C-43, *supra* note 1, clause 18 (proposed s. 42.1):
"s. 42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.
(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada."

Given the seriousness of the decisions at stake (the effects of which could result in removal to persecution, torture or death), robust procedural fairness protections are clearly required. Those are provided through appeal possibilities and humanitarian relief, which should therefore be maintained.

Notably, the combined effect of clauses 8, 9, 10, 18 and 24 is to deny procedural protections to individuals who might subsequently be removed to a serious risk of torture. This type of blanket exclusion, as the Supreme Court of Canada held in *Suresh*, violates Article 3 of the Convention against Torture:

> [...] Article 3 of the CAT, which explicitly prohibits the deportation of persons to states where there are "substantial grounds" for believing that the person would be "in danger of being subjected to torture", informs s. 7 of the *Charter*. It is only reasonable that the same executive that bound itself to the CAT intends to act in accordance with the CAT's plain meaning. Given Canada's commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s. 53(1)(*b*) stage of the proceedings. More particularly, the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds.[70]

Amnesty International recommends that clauses 9, 10, and 24 be withdrawn. Unless clause 18 is amended to clarify the *IRPA*'s overly broad inadmissibility provisions, Amnesty International further recommends that it be withdrawn as well.

[70] *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada.* [2002] 1 S.C.R. 3, at para. 19.

Recommendations

AI Canada is deeply concerned about the potentially devastating human rights consequences of Bill C-43. The following table provides a summary of our recommendations, aimed at bringing this Bill closer in line with Canada's international and domestic legal obligations with respect to promoting accountability, protecting human rights, and ensuring access to justice.

Clause	**Human Rights Concerns**	**AI Canada Recommends**
9 (proposed s. 25(1))	• Accountability • Protection (against torture and persecution) • Protection (of children and families) • Access to justice	• Remove • At a minimum, make explicit provision for the requirement to make the best interests of the child a primary consideration in all immigration proceedings, and for the obligation to respect the right to family life.
10 (proposed s. 25.1(1))	• Accountability • Protection (against torture and persecution) • Protection (of children and families) • Access to justice	• Remove • At a minimum, make explicit provision for the requirement to make the best interests of the child a primary consideration in all immigration proceedings, and for the obligation to respect the right to family life.
18 (proposed s. 42.1)	• Protection (against torture and persecution) • Access to justice	• Clarify the *IRPA*'s overly broad inadmissibility provisions, by providing precise definitions. • In the alternative, remove.
24 (proposed s. 64(2))	• Accountability • Protection (against torture and persecution) • Access to justice	• Remove
n/a	• Accountability	• Addition of a provision ensuring that extradition or criminal investigations will be pursued over deportation and denial of entry when there are reasonable grounds to believe that a serious

		international crime has been committed outside Canada by an individual present in Canada.